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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ERIC LEE HUNT et al., Defendants and Appellants.	C080811 (Super. Ct. No. 15F01299)

Following a jury trial, defendant Eric Lee Hunt (Hunt) was convicted of unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a)), receiving a stolen vehicle (Pen. Code, § 496d, subd. (a)),[1] and felony evading an officer (§ 2800.2, subd. (a)). The trial court sustained a strike (§§ 1170.12, 667, subds. (b)-(i)) and three prior prison terms (§ 667.5, subd. (b)). The trial court sentenced Hunt to serve a 10-year-4-month state prison term.

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[1] Undesignated statutory references are to the Penal Code.

Codefendant Steve May (May) was convicted by jury of unlawfully taking or driving a vehicle and receiving a stolen vehicle. The trial court sustained one strike and five prior prison terms. The court sentenced May to serve nine years in state prison.

On appeal, Hunt contends: (1) his prior prison terms are invalid following Proposition 47 because the underlying felonies were reduced to misdemeanors or no longer survive the five-year washout period; (2) his conviction for unlawfully driving or taking a vehicle should be reduced to a misdemeanor because there is no proof the value of the stolen vehicle was more than $950; (3) the jury was instructed on a legally incorrect theory of guilt regarding unlawful driving or taking a vehicle; (4) any proof of the car being worth more than $950 was admitted due to ineffective assistance of counsel; (5) the greater than $950 threshold applies to convictions for unlawfully driving a vehicle as a matter of equal protection and to avoid absurd consequences; (6) he cannot be convicted of receiving the same vehicle he was convicted of stealing; and (7) if his receiving conviction stands it must be reduced to a misdemeanor because there is no proof the vehicle was worth more than $950.

Appointed counsel for May filed an opening brief setting forth the facts of the case and asked this court to review the record to determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.)

We conclude Hunt's contentions regarding his prior prison terms are correct. With regard to the Vehicle Code section 10851 convictions, we conclude the convictions for both defendants must be reversed since the jury was instructed on a legally incorrect theory of guilt. Hunt's remaining contentions are without merit. As to May, we have reviewed the record and find no additional error favorable to May.

We shall modify the judgment to strike Hunt's prior prison term enhancement and reverse both defendants' unlawful taking or driving convictions. We shall remand for additional proceedings.

BACKGROUND

On March 9, 2015, at around 5:00 p.m. H.S. parked her Chevy Silverado pickup truck at the apartment complex managed by her husband. Her husband discovered the truck was missing the following morning at around 7:00 a.m. H.S. did not know either defendant and never gave them permission to have her truck.

On March 10, 2015, Sacramento County Probation Officer Patrick Michael conducted a probation check on May at his Rio Linda residence. Officer Michael noticed a Chevy pickup truck parked in May's driveway. Officer Michael saw that the truck's steering column was ripped out. Officer Michael contacted a fellow probation officer on the auto theft task force, Officer Cheree Robinson. Within 20 minutes, Officer Robinson and other law enforcement officers arrived to observe the vehicle.

A silver Honda arrived at the scene during the surveillance. A person got out of the Honda from the passenger's side, went to May's residence, and then into the Chevy truck. The Chevy truck drove off with the Honda following directly behind. Hunt drove the truck and May drove the Honda. Both vehicles drove at a high rate of speed, with officers in pursuit.

California Highway Patrol Officer Scott Kliebe and his sergeant were part of the pursuit. They were in an unmarked vehicle that was equipped with a siren, a red burning lamp, an oscillating blue light with oscillating forward highlights, and rear lights that oscillated blue and red. Officer Kliebe wore plain clothes with a tactical vest marked "POLICE" on the front and back. The sergeant wore a similar tactical vest.

Officer Kliebe's vehicle cut off the Chevy truck by stopping in front of it in the middle of an intersection and turning on the forward red light and oscillating headlights. Officer Kliebe and his sergeant exited their vehicle with firearms pointed at the truck. The sergeant ordered Hunt to put his hands in the air. The Honda fled at this time.

Hunt initially stopped the truck, but then looked back and put the truck into reverse gear. Officer Kliebe and the sergeant entered their vehicle, activated the lights, and pursued the truck.

The Chevy truck veered across the entire street as it drove backwards. Officer Robinson, who was also at the scene, had to drive onto the sidewalk to avoid the Chevy truck. The truck stopped soon after. Hunt fled on foot, but was eventually apprehended. About a week later, May was arrested by Officer Kliebe.

DISCUSSION

I

Hunt's Prior Prison Terms

On September 25, 2015, the trial court sustained a strike allegation against Hunt based on a 1995 conviction for first degree burglary (§ 459) as well as three prior prison terms based a 2005 conviction for possession of a controlled substance (Health & Saf. Code, § 11377), a 2009 conviction for receiving stolen property (§ 496, subd. (a)), and a 2012 conviction for petty theft with a prior (§ 666). Before Hunt's November 13, 2015, sentencing hearing, the court reduced the prior convictions for receiving stolen property and petty theft with a prior to misdemeanors pursuant to section 1170.18. At sentencing, the trial court imposed a one-year term for the allegation based on the 2009 receiving stolen property conviction and struck the other two prior prison terms pursuant to section 1385.

In his opening brief, Hunt contends the 2009 prior prison term for which he was sentenced should be stricken because the underlying felony conviction was reduced to a misdemeanor. The Attorney General argues the contention is forfeited by trial counsel's failure to raise it at sentencing, and, striking the 2009 prior prison term does not change Hunt's sentence because the felony underlying one of the other prior prison terms, Hunt's 2005 conviction for possession of a controlled substance, was not reduced to a

misdemeanor.[2] In a supplemental brief, Hunt asserts this 2005 conviction is washed out because the 2009 and 2015 priors have been reduced to misdemeanors.

Proposition 47 (as approved by voters Gen. Elec., Nov. 4, 2014, eff. Nov. 5, 2014), the Safe Neighborhoods and Schools Act (the Act), reduces various felonies to misdemeanors. Among the affected crimes are petty theft with a prior and receiving stolen property. (See §§ 1170.18, subd. (a), 666, 496, subd. (a), & 490.) Since the prior prison term enhancement requires that defendant be convicted of a felony, serve a prison term for that conviction, and not be free from both prison custody and the commission of a new felony for any five-year period following discharge (§ 667.5, subd. (b)), this raises the question of whether a prior prison term enhancement based on what is now a misdemeanor conviction survives the Act, or whether such a conviction can prevent an earlier prison prior from washing out.

In a case decided during this appeal, the California Supreme Court held that "Proposition 47's mandate that the resentenced or redesignated offense 'be considered a misdemeanor for all purposes' (§ 1170.18, subd. (k)) permits defendants to challenge felony-based section 667.5 and 12022.1 enhancements when the underlying felonies have been subsequently resentenced or redesignated as misdemeanors." (*People v. Buycks* (2018) 5 Cal.5th 857, 871.) A prison prior based on a felony that is now a misdemeanor after Proposition 47 is no longer valid. The Supreme Court also held in *Buycks* that a prior felony conviction reduced to a misdemeanor under section 1170.18 cannot be used to impose the enhancement under the five-year "washout" provision. (*Id*. at p. 889.)

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[2] We grant the Attorney General's request for judicial notice of court records showing the 2005 prior for possession of a controlled substance has not been reduced to a misdemeanor. (Evid. Code, §§ 459, 452, subd. (d).)

Applying *Buycks, supra,* 5 Cal.5th 857, we conclude Hunt's 2009 prior prison term is invalid and must be stricken. Further, neither of the other two convictions alleged as prison priors can support a prior prison term allegation, as the 2012 prior has been reduced to a misdemeanor and the 2009 conviction washes out under the five-year rule. Since the other two prior prison terms were stricken pursuant to section 1385, it is unnecessary to strike them.

II

The Vehicle Code Section 10851 Convictions

Among the other crimes changed by the Act is grand theft. Following the Act, when the value of the money, labor, real or personal property taken does not exceed $950, the crime is classified as petty theft, a misdemeanor, subject to exceptions not relevant here. (§ 490.2.) In another case decided during this appeal, the California Supreme Court held section 490.2 includes convictions for vehicle theft under Vehicle Code section 10851 where it is shown the vehicle was worth $950 or less, but it does not apply to convictions for posttheft driving under that code section. (*People v. Page* (2017) 3 Cal.5th 1175, 1180, 1188-1189 (*Page*).)

Hunt raises several attacks on his Vehicle Code section 10851 conviction, all based on section 490.2 as interpreted in *Page, supra,* 3 Cal.5th 1175. He claims his conviction for unlawfully taking a vehicle must be reduced to a misdemeanor because there was insufficient evidence the truck's value exceeded $950. If we conclude his conviction was based on unlawfully driving a vehicle, then Hunt argues the absurd consequences doctrine and equal protection require reducing the conviction to a misdemeanor. He also asserts reversal is required because the trial court failed to instruct the jury that the stolen vehicle's value must exceed $950 at the time of the theft. This allowed the jury to convict him on a legally invalid theory of guilt, a violation of his right to due process. The last contention has merit. Since the defendants may be retried for this offense, we address Hunt's other contentions as well.

A.

Basis of Conviction: Vehicle Theft or Unlawful Driving

Hunt contends his conviction was based on vehicle theft rather than unlawful driving. He relies on the following closing argument from the prosecution: "Now before I go to the vehicle theft, the theft and receiving stolen property, what is important to remember is that I think it's very apparent from the evidence, [defendant] Hunt is our thief. Okay, [defendant] May is the helper. And so, when you have that situation, it's what we call aiding and abetting . . . ." He also relies on a point made by the prosecutor in closing argument, that Hunt and May "took the truck and they weren't going to give it back." Since the only evidence of the truck's value was a statement from H.S., elicited on cross-examination, that the truck was purchased for $10,000 in 1999, Hunt concludes his prosecution was based on vehicle theft and there is insufficient evidence of the vehicle's worth to support a felony conviction under that theory of guilt.

The issue here is not sufficiency of the evidence. In addition to holding the Act applied to theft convictions under Vehicle Code section 10851, the Supreme Court also held in *Page, supra,* 3 Cal.5th 1175 that the Act did not apply "[w]here the trial testimony . . . shows post-theft driving—that is, driving the vehicle following a 'substantial break' after the vehicle had initially been stolen . . . ." (*Id.* at p. 1189.) Here, there is substantial evidence to support a felony conviction of both defendants under an unlawful driving theory. The theft was already complete when Hunt drove the stolen Chevy truck that was parked by May's residence. (See *People v. Gomez* (2008) 43 Cal.4th 249, 255 [theft is complete when the thief reaches a place of temporary safety].) In order to obtain a conviction for unlawfully driving a vehicle under an aider and abettor theory, the prosecutor must prove "more than mere presence in the automobile. At a minimum, defendant must have known that the vehicle had been unlawfully acquired and must have had that knowledge at a time when he [or she] could be said to have, in some way, aided or assisted in the driving." (*People v. Clark* (1967)

251 Cal.App.2d 868, 874.) Although May was not in the stolen Chevy truck, it was parked at his property, and he drove Hunt there, so he could commence the post-theft driving of the truck. That is substantial evidence of May's guilt of aiding and abetting under an unlawful driving theory.

B.

Jury Instruction on Unlawful Taking and Driving

Hunt contends the jury was instructed on a legally invalid theory of guilt regarding unlawful taking or driving a vehicle. Specifically, the jury was not instructed on an element for a Vehicle Code section 10851 felony offense based on the taking of the vehicle: that the stolen vehicle's value must exceed $950 at the time of the theft. Hunt argues this error deprived him of due process.

This contention was first addressed by Division Seven of the Second Appellate District in *People v. Gutierrez* (2018) 20 Cal.App.5th 847 (*Gutierrez*). Like this case, *Gutierrez* involved a Vehicle Code section 10851 conviction rendered after the Act's effective date. (*Gutierrez,* at p. 852.) The jury was instructed with the standard pattern instruction on unlawful taking and driving. (*Id*. at p. 851 & fn. 3.) The Court of Appeal found that, following *Page, supra,* 3 Cal.5th 1175, "to obtain a felony conviction for vehicle theft, the People were required to prove as an element of the crime that the rental car he took was worth more than $950. [Citations.]" (*Id*. at p. 855.) Like here, there was no evidence of the value of the vehicle in question to support a conviction under a theft theory.[3] (*Id*. at p. 856.)

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[3] The only evidence of the Chevy truck's value was testimony elicited on cross-examination that it was purchased for $10,000; this is insufficient to support a finding of the Silverado's value when it was stolen in 2015. In light of our ruling, we reject Hunt's contention trial counsel was ineffective in eliciting this evidence on cross-examination.

The lack of evidence to support a felony verdict under a theft theory did raise the issue of whether the evidence was sufficient to support a conviction. "Although the record cannot support a guilty verdict for felony vehicle theft, the problem with Gutierrez's felony conviction is not the sufficiency of the evidence but jury instructions that failed to adequately distinguish among, and separately define the elements for, each of the ways in which [Vehicle Code] section 10851 can be violated." (*Gutierrez, supra*, 20 Cal.App.5th at p. 856.) Failing to instruct the jury on this essential element "allowed the jury to convict Gutierrez of a felony violation of [Vehicle Code] section 10851 for stealing the rental car, even though no value was proved—a legally incorrect theory—or for a nontheft taking or driving offense—a legally correct one." (*Gutierrez,* at p. 857.) Such error is harmless only " 'when "other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary" under a legally valid theory.' [Citation.]" (*Ibid.*)

In *People v. Bussey* (2018) 24 Cal.App.5th 1056, 1061-1062 (*Bussey*), this court adopted *Gutierrez.* We do so as well. Since the pattern jury instructions on Vehicle Code section 10851, like those in *Bussey* and *Gutierrez*, did not include as an element that the vehicle be worth more than $950 for conviction under an unlawful taking theory, the jury was instructed under a legally invalid theory of guilt. As in *Gutierrez* and *Bussey*, we cannot conclude the error was harmless. (See *Bussey* at p. 1062; *Gutierrez, supra*, 20 Cal.App.5th at p. 857.) Although there is evidence to support an unlawful driving theory, there is also evidence to support guilt under unlawful taking. Such evidence includes the stolen Chevy truck was found at May's residence the day it was discovered stolen and no more than a day after it was stolen, the ignition had been damaged since it was stolen and could be started only by using a little knife. In light of the prosecutor's arguments advancing an unlawful taking theory as to both defendants and the lack of any evidence the jury relied only on an unlawful driving theory, we reverse both defendants' Vehicle Code section 10851 convictions.

When the jury is instructed on a legally improper theory of guilt and the error is not harmless, the remedy is to "reverse the felony conviction for unlawful driving or taking a vehicle and remand the matter to allow the People either to accept a reduction of the conviction to a misdemeanor or to retry the offense as a felony with appropriate instructions. [Citations.]" (*Gutierrez, supra*, 20 Cal.App.5th at p. 857; see *Bussey, supra*, 24 Cal.App.5th at p. 1062 [adopting same remedy].) We shall do so here as to both defendants.

Since Hunt's absurd consequences and equal protection contentions are relevant in the event of a retrial, we address them as well.

C.

Absurd Consequences Doctrine

Hunt asserts that if his felony conviction stands under an unlawful driving theory, then it should nonetheless be reduced to a misdemeanor under the absurd consequences doctrine. According to Hunt, unlawful driving is less culpable than the unlawful taking of a vehicle. From this, he reasons it would be absurd to punish more severely a defendant who unlawfully drives a vehicle worth not more that $950 than a defendant who unlawfully takes a vehicle of the same value. (See *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737 [depart from literal construction of statutory text to avoid absurd consequences].) He also finds that allowing this different treatment frustrates the Act's ameliorative purpose.

Page refutes Hunt's argument regarding the Act's purpose. In holding the Act applied to unlawful taking under Vehicle Code section 10851, the Supreme Court relied on its instruction for broad and liberal construction, and found this construction served to accomplish the Act's purposes. (*Page, supra*, 3 Cal.5th at p. 1187.) In finding the Act did not apply to Vehicle Code section 10851 convictions based on unlawful post-theft driving (*Page*, at pp. 1188-1189), the Supreme Court implicitly found this construction was consistent with the Act's purposes.

Hunt's absurd consequences argument is based on ranking the relative culpability of unlawful driving and unlawful taking. But it is not for this court to rank levels of culpability. "It is both the prerogative and the duty of the Legislature to define degrees of culpability and punishment, and to distinguish between crimes in this regard. [Citation.] Courts routinely decline to intrude upon the 'broad discretion' such policy judgments entail. [Citation.]" (*People v. Turnage* (2012) 55 Cal.4th 62, 74.) We decline defendant's invitation to do so here.

D.

Equal Protection

Hunt claims the $950 threshold should be applied to unlawful driving of a vehicle as a matter of equal protection. He asserts there is neither a compelling state interest nor a rational basis for the disparate treatment.

"[N]either the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles. [Citation.]" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) It has therefore long been the case that "a car thief may not complain because he [or she] may have been subjected to imprisonment for more than 10 years for grand theft of an automobile [citations] when, under the same facts, he [or she] might have been subjected to no more than 5 years under the provisions of [Vehicle Code] section 10851 of the Vehicle Code." (*People v. Romo* (1975) 14 Cal.3d 189, 197.) Unless the defendant can show he or she " 'has been singled out deliberately for prosecution on the basis of some invidious criterion,' . . . the defendant cannot make out an equal protection violation. [Citation.]" (*Wilkinson*, at p. 839.) Hunt has not made such a showing. His claim fails.

III

Receiving a Stolen Vehicle

Hunt contends his conviction for receiving a stolen vehicle should be reversed because he cannot be convicted of both stealing and receiving the same vehicle. Since we reverse the Vehicle Code section 10851 conviction, we decline to address this contention.

Hunt also asserts the Act's greater than $950 threshold for felony liability applies to receiving a stolen vehicle, and his conviction for this offense should be reduced to a misdemeanor because there was no evidence as to the current value of the stolen Chevy truck.

While the Act amended the definition of receiving stolen property (§ 496) to predicate felony liability on the item received exceeding $950 in value, it made no such change to the statute governing receiving a stolen vehicle. (§§ 1170.18, subd. (a), 496, 496d.) In *Bussey*, we rejected the same claim Hunt makes here. We first looked to the relevant statutory language, finding: "Section 490.2 contains key distinguishing introductory language: 'Notwithstanding Section 487 *or any other provision of law* defining grand theft . . . .' (§ 490.2, subd. (a), italics added.) Section 496 does not include any similar language indicating that its provisions are to apply to the entire subject of knowing receipt of stolen property. That the drafters of the proposition did not include a similar sweeping phrase in section 496 while placing one in section 490.2 is a strong signal that section 496 is not to operate in the same fashion." (*Bussey*, *supra*, 24 Cal.App.5th at p. 1063.) Since 496d, which contains no value threshold, was the more specific statute, it controlled over section 496. (*Bussey*, at p. 1063.)

Applying *Bussey*, *supra*, 24 Cal.App.5th 1056 we reject Hunt's contention. Felony liability for receiving a stolen vehicle does not require proof that the value of the vehicle in question exceeded $950.

IV

May's Wende Review

Notwithstanding appellate counsel's *Wende* brief, we found reversible error for May and shall reverse the Vehicle Code section 10851 conviction. Additional briefing is unnecessary in light of the extensive briefing in this case. Based on our review of the record, we find no other arguable issues that would result in a disposition more favorable to May.

DISPOSITION

The judgment is modified to strike defendant Eric Lee Hunt's prior prison term enhancement. The Vehicle Code section 10851 convictions for defendant Eric Lee Hunt and codefendant Steve May are reversed and the matter is remanded to allow the People either to accept a reduction of the convictions to a misdemeanor or to retry the offenses as felonies with appropriate instructions. In all other respects, the judgments are affirmed.

/s/
HOCH, J.

We concur:

/s/
BUTZ, Acting P. J.

/s/
MURRAY, J.